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No. ....

IN THE

Supreme Court of the United States

October Term, 1982

SULO FREDERICK JANSSON,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. DID THE COURT BELOW EXCEED ITS AUTHORITY AND VIOLATE THE SIXTH AMENDMENT BY AUGMENTING THE RECORD ON APPEAL TO INCLUDE GRAND JURY TESTIMONY WHICH WAS NEITHER PART OF THE TRIAL RECORD NOR SUBJECT TO CROSS-EXAMINATION WHEN THE INFORMATION CONTAINED THEREIN WAS DEEMED RELEVANT, BY THE COURT BELOW, TO PETITIONER'S GUILT?
2. DID THE PROSECUTOR VIOLATE THE SIXTH AMENDMENT WHEN HE CROSS-EXAMINED PETITIONER IN A MANNER WHICH EFFECTIVELY INTRODUCED THE INADMISSIBLE GRAND JURY TESTIMONY OF A GOVERNMENT WITNESS CONCERNING HIGHLY PREJUDICIAL ADMISSIONS, ALLEGEDLY MADE BY PETITIONER, WHEN THE GOVERNMENT COULD NOT AND DID NOT LAY A FOUNDATION FOR THE ADMISSION OF THIS TESTIMONY FROM THE WITNESS HIMSELF WHEN HE EARLIER TESTIFIED AT TRIAL?
3. DID THE PROSECUTOR VIOLATE PETITIONER'S RIGHT TO A FAIR TRIAL WHEN, IN THE COURSE OF CROSS-EXAMINING HIM ABOUT A NUMBER OF ADMISSIONS HE PURPORTEDLY MADE TO AN AVAILABLE GOVERNMENT WITNESS WHO WAS NEVER ASKED ABOUT THEM AT TRIAL, HE MISREPRESENTED WHAT THE WITNESS HAD ACTUALLY CLAIMED PETITIONER SAID TO HIM?

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vs.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sulo Frederick Jansson, by and through his attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below.

The memorandum opinon of the Court of Appeals [App. "A", *infra* 1a-2a] and the Order denying Appellant's Petition for Rehearing [App. "B", *infra* 3a] are unreported. No opinion was rendered by the District Court of the Central District of California.

Jurisdiction.

The judgment of the Court of Appeals, which denied Appellant's Petition for Rehearing was entered on July 28, 1982 [App. "B", *infra* 3a]. The Memorandum Opinion,

which affirmed the judgment of the District Court was entered on June 22, 1982 [App. "A", *infra*, 1a-2a] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions Involved.

United States Constitution, Fifth Amendment: [App. "C", *infra*, 4a].

United States Constitution, Sixth Amendment: [App. "D", *infra*, 5a].

Statutes Involved.

Federal Rules of Appellate Procedure.

Rule 10 *The Record on Appeal.*

(e) *Correction or Modification of the Record.*

If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Statement.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted, on all counts of the First Superceding Indictment, of conspiracy to commit mail fraud (18 U.S.C. 1341, 18 U.S.C. 371) and eleven counts of mail fraud (18 U.S.C. 1341).

With respect to the conspiracy count, petitioner was sentenced to a prison term of two years and fined ten thousand ($10,000) dollars. With respect to the substantive counts, imposition of sentence as to imprisonment was suspended. Petitioner was placed on probation for five years under specified terms and conditions and fined one thousand ($1,000) dollars on each count. The periods of probation with respect to the substantive counts are to run concurrently.[1]

1. Prior to trial, the grand jury investigated an arson which occurred at the Cal Stereo warehouse in Torrance, California. In addition, the grand jury investigated a mail fraud relating to an insurance claim for equipment losses sustained as a result of the fire. Petitioner was a part-owner of Cal Stereo. The indictment herein, returned by the grand jury, confined itself to allegations relating to mail fraud. While it was unequivocably concluded that the warehouse fire was caused by an arsonist, neither petitioner nor any co-defendants were charged or connected with this crime. Petitioner sought an order *in limine* prohibiting the admission of arson evidence at trial on the grounds that such evidence would unfairly suggest that he was responsible for the fire and thereby prejudice his ability to receive a fair trial with respect to the crimes alleged. The government contended that the extent of the fire within the warehouse was material to its theory of the case and that it needed to introduce evidence of the arson in order to prove the extent of the fire. The defense, in its motion *in limine* and during argument on the motion, offered to stipulate to the extent

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[1]Appellant's co-defendant, Edward Shapiro was convicted on all counts of the First Superceding Indictment as well. The indictment was dismissed against co-defendant Melvin Neil Belsky who became a government witness, and co-defendant Richard Pierce who died prior to trial.

of the fire so long as its nature was not revealed. [R.T. 33-34, 96-97].[2] The trial judge declined to grant the motion *in limine* but instructed the prosecutor "not to elicit or argue the fact that the fire was intentionally set . . . without prior Court approval." [R.T. 37].

2. At trial, the prosecutor, without prior court approval, repeatedly injected the issue of arson into the case. During opening statement he told the jury that the fire department had found a broken window when it arrived at the scene. [R.T. 44]. A fire department investigator testified over objection that a container containing gasoline was found near the broken window and that the fire's origin was "unnatural." [R.T. 99]. This container was introduced into evidence. During the testimony of another government witness the prosecutor sought, over objection, to have him read a memo, as past recollection recorded, with respect to the extent of the fire. The prosecutor informed the Court at side bar that the document contained the word "arson." The prosecutor was instructed to redact it. The prosecutor failed to inform the Court that the document contained other references to arson. As a result, the witness testified that an investigation by fire investigators revealed that a warehouse window had been broken and that a car had been observed driving away from the scene. [R.T. 128].

The prosecutor next sought to create the impression that petitioner was responsible for the fire. He elicited testimony that petitioner "laughed" when informed of the fire. [R.T. 231]. Then, while cross-examining petitioner the following exchange took place;

> Q [By the Prosecutor] Did you ever joke *before* the fire about the financial problems Cal Stereo was having?

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[2]R.T. refers to Reporter's Transcript.

A: [By Mr. Jansson] No.

Q: Did you ever joke that a fire sale was a good way to make money?

MR. MARMARO: Objection, Your Honor.

THE COURT: You may answer.

Q: Did you ever?

A: No.

Q: Did you ever joke about Puff the Magic Dragon?

A: No.

Q: Is Mr. Watson a truthful man?

A: Yes.

Q: *Are you aware that he [Watson] has testified that you said that?*

A: I don't remember.

Q: *You read his testimony.*

A: Yes.

Q: Did he say that?

MR. O'NEILL: Objection, Your Honor. I believe that may mischaracterize the testimony. I don't recall that being testified to.

THE COURT: I don't recall the testimony either. Objection sustained.[3] [Emphasis supplied]. [R.T. 472-473].

Prior to the cross-examination of petitioner, Mr. Watson had testified for the government during its case-in-chief. He also testified before the grand jury. At trial, the prosecutor deliberately avoided asking Watson about any of these purported admissions. In stark contrast to the prosecutor's misleading representations in the form of leading questions,

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[3]As will be discussed below, the Court of Appeals held that these purported admissions were relevant to material issues in the case and at worst minimally prejudicial. [Appendix "A" *infra*, 1a].

the relevant portion of Watson's grand jury testimony reveals that Watson:

A. Could not recall ever hearing petitioner say that a "fire sale would be a good way to make money."

B. Thought that petitioner might have used the phrase "Puff the Magic Dragon" but could not remember specific instances when he made this statement;

C. Could not acknowledge, when asked by the prosecutor to do so, that petitioner ever actually used the phrase "Puff the Magic Dragon" [Appendix "E", *infra* 6a-7a].

As a result of the prosecutor's prejudicial and misleading questions, petitioner moved in writing, for a mistrial. The motion was denied. [R.T. 491].[4]

3. During petitioner's appeal the prosecutor moved to augment the record to include the grand jury testimony of a number of witnesses, including Mr. Watson. Petitioner objected in writing. He argued that the grand jury testimony was neither part of the trial record nor subject to cross-examination. Therefore, augmentation violated Rule 10 of the Federal Rules of Appellate Procedure and petitioner's right to confrontation under the Sixth Amendment of the United States Constitution. The Court of Appeals granted the motion and the record was augmented. In its Memorandum Opinion [App. "A" *infra* 1a] the Court concluded that the government's reliance upon arson evidence was relevant to show that the fire did not extend to all portions of the warehouse from which claimed merchandise was obtained.[5] Moreover, the Court found that the government's

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[4]The trial court specifically found that petitioner was not prejudiced by the questions but offered to admonish the jury, if requested, that it should not speculate about the "source" of the fire. By then the jury had been told in many different ways that the "source" was arson and petitioner declined to request such an instruction. [R.T. 491-492].

[5]As noted previously petitioner offered to stipulate to this fact.

arson evidence did not implicate petitioner as a perpetrator of the fire and that his admissions to Watson were relevant to the issue of his intent. Therefore, the Court of Appeals declined to find that petitioner was prejudiced by either the government's arson evidence or petitioner's admissions to Watson.

REASONS FOR GRANTING THE PETITION.

1. Augmentation of the Record to Include Mr. Watson's Grand Jury Testimony.

This issue presents the important question of whether the Court of Appeals exceeded its authority under Rule 10(e) of the Federal Rules of Appellate Procedure and violated petitioner's Sixth Amendment rights by augmenting the record to include Watson's grand jury testimony. Since Watson was a government witness, the trial judge received a copy of this testimony *in camera* and authorized its disclosure to defense counsel prior to the commencement of the trial. However, the prosecutor never questioned Watson about petitioner's purported admissions at trial. The portion of his grand jury testimony which related to the admissions was neither part of the trial record nor considered by the trial court or jury when the prosecutor cross-examined petitioner about them.

An appellate court may, on its own initiative or at the suggestion of either party correct mistakes or misstatements in the trial record. Rule 10(e) Federal Rules of Appellate Procedure. It may also, under limited circumstances resolve issues, not decided below. In this regard, questions of law may be resolved where proper resolution is without doubt or is necessary to avoid injustice. *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L.Ed.2d 826, 837, 96 S.Ct. 2668 (1976), See, *Hormel v. Helvering*, 312 U.S. 552, 557-558, 85 L.Ed. 1037, 1041, 61 S.Ct. 719 (1941).

In marked contrast, when a party attempts to place new *facts* before an appellate court which are germane to the proceedings before the trial court, it is a clear abuse of discretion to augment the record. *United States v. Gray*,

611 F.2d 194, 196 fn. 1 (7th Cir. 1979); *United States v. Walker*, 601 F.2d 1051 (9th Cir. 1979).[6]

Here, the court below, after considering Watson's Grand Jury testimony, expressly found "the statements attributed to Jansson . . ." [by Watson] to be relevant to his criminal intent. [Appendix "A" *infra* 1a]. In order to reach this conclusion it was necessary for the court below to have read Watson's grand jury testimony, determined that Watson testified in the same manner before the grand jury as the prosecutor, through the use of leading questions, "testified" at trial, and concluded that Watson's grand jury testimony was worthy of belief. Therefore, the court below, by augmenting the record, evaluated new facts which the jury never considered, in reaching its decision about a material issue in the case. Watson's grand jury testimony had never been subjected to cross-examination. The prosecutor deliberately failed to elicit any testimony from Watson about the admissions during the government's case because he knew he could never lay a foundation for their admissibility. Instead, he testified for Watson and prejudicially distorted his grand jury testimony. In doing so he vouched for the accuracy of these non-record statements and suggested that petitioner was an arsonist.

By augmenting the record, evaluating Watson's grand jury testimony and utilizing that testimony in reaching its decision, the Court below placed petitioner in an untenable position. He was forced to defend on appeal against a witness whom he could not cross-examine and who had never been asked to testify at trial about the crucial topics of

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[6]*Compare United States v. Aulet*, 618 F.2d 182 (2nd Cir. 1980) where both parties stipulated that the Court of Appeals should address an issue which could only be decided by supplementing the trial record. Credibility was not to be evaluated by the appellate court from the materials augmented and appellant failed to demonstrate prejudice.

petitioner's admissions. Moreover, he could do nothing to erode the prosecutor's successful plan to impeach petitioner by submitting this non-record testimony directly to the Court of Appeals for its evaluation. The court below expressly found petitioner's admissions to be relevant to a material issue in the case. Therefore, the Court of Appeals appears to have concluded that Watson's grand jury testimony was a "crucial link" in the proof of petitioner's intent. See, *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

It is suggested that the Court of Appeals committed a substantial violation of petitioner's right of confrontation by considering Watson's grand jury testimony. Prior decision's of this Court have held that substantial Sixth Amendment violations are ". . . constitutional error of the first magnitude . . ." which cannot be cured by any perceived lack of prejudice. See *Davis v. Alaska*, 415 U.S. 308, 318, 39 L.Ed.2d 347, 355, 94 S.Ct. 1104 (1974); *Smith v. Illinois*, 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968); *Brookhart v. Janis*, 384 U.S. 1, 3, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966).

This Court, in *Davis v. Alaska, supra*, found a Sixth Amendment violation when the defense was not permitted to impeach a witness concerning his possible bias. Here, Watson could not be cross-examined in the Court of Appeals concerning the accuracy of the statements he made before the grand jury.[7] Yet, the Court below evaluated that non-record testimony which had never been subject to cross-examination and incorporated it into its opinion on appeal.

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[7]Petitioner respectfully disagrees with the Court of Appeals that the prosecutor's questions did not suggest his participation in the arson. To call Watson to rebut the prosecutor's assertions with respect to his grand jury testimonywould have compounded this prejudice.

For these reasons, it is submitted that the Court of Appeals has departed from the accepted and usual course of judicial proceedings in augmenting the record on appeal. Due to the prejudicial effect upon petitioner, the Court's action has violated his Sixth Amendment rights in a way which conflicts with applicable decisions of this Court.

2. The Prosecutor's Misconduct as a Violation of Petitioner's Sixth Amendment Rights.

This case present the important question whether the principles announced in *Douglas v. Alabama, supra*, are to be applied when a prosecutor testifies about pre-trial statements, not subject to cross-examination, which were made by an available but uncalled trial witness. The prosecutor's leading questions, which seek to reproduce the pre-trial statements of a witness who exercises his Fifth Amendment rights, are the equivalent of testimony before the jury. Under these circumstances the jury is likely to believe that the witness has in fact made the statements attributed to him by the prosecutor and that these statements are true. *Douglas v. Alabama, supra*, 380 U.S. at 419, 13 L.Ed.2d at 937-938. This view has been extended to cases, similar to the one at bar, where the prosecutor cross-examines a defendant with respect to a pre-trial statement made by a witness who does not testify at trial. *Harris v. Speaks*, 606 F.2d 639 (5th Cir. 1977)[8] When the witness cannot be cross-examined and the statements bear ". . . on a fundamental part of the State's case against Petitioner . . .", the right to Confron-

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[8]The trial transcript demonstrates the wilfulness of the prosecutor's misconduct. He called Watson to the stand and deliberately failed to question him about petitioner's purported admissions. His misleading characterization in the form of leading questions, emphasized to the jury that Watson had previously testified in the manner recited by the prosecutor. Thus, the prosecutor intended that the jury believe that Watson made the statements and that they were true.

tation under the Sixth Amendment is violated. *Douglas v. Alabama, supra,* at 380 U.S. 240, 13 L.Ed.2d 938.

The circumstances which permit a departure from the Sixth Amendment's preference for face-to-face confrontations are limited. They must be grounded upon necessity and the belief that the evidence, not subject to cross-examination, is trustworthy. As a general rule the prosecution has a duty to either produce the declarant or demonstrate his unavailability before the declarant's statement may be offered into evidence. *Ohio v. Roberts,* 448 U.S. 56-65, 65 L.Ed.2d 597, 607, 100 S.Ct. 2531 (1980).

The prosecutor's misconduct in failing to call Watson could not have been motivated by necessity. Watson had been a government witness at trial. The prosecutor chose not to examine him about petitioner's purported admissions. This was purposely done since the equivocal nature of Watson's grand jury testimony makes it apparent that the government could not lay a foundation for this testimony. Appendix "E", *infra.* In this regard, Watson was uncertain which, if any admissions, petitioner made; what petitioner actually insinuated about fire in a "joking" manner; and approximately when any of these purported admissions were made. Thus, the prosecutor's tactics were motivated by a conscious attempt to unfairly build his case against petitioner. See, *Namet v. United States,* 373 U.S. 179, 186, 10 L.Ed.2d 278-283, 83 S.Ct. 1151 (1963).

Moreover, both the equivocal nature of Watson's grand jury testimony as well as petitioner's inability to cross-examine him at that forum, establish that Watson's grand jury testimony lacked sufficent indicia of reliability to justify its admission into evidence.[9] Any suggestion that petitioner

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[9]Compare *Demos v. Wainwright,* 663 F.2d 224 fn. 3 (5th Cir. 1982) where the deposition testimony utilized at trial had been previously subjected to cross-examination. The Court of Appeals did not discuss the factors, if any, which made it necessary to utilize the deposition at trial.

should have recalled Watson to the stand in order to rebut the prosecutor's testimony places a number of unfair burdens upon him. First, it allows the prosecutor to circumvent his inability to lay a foundation for the admission of these statements. Second, under the circumstances of this case, it would have required petitioner to highlight testimony which prejudicially suggested his participation in an arson for which he was never indicted. Third, it would have required petitioner to call Watson to the stand to correct the prosecutor's violation of his Sixth Amendment rights.

Because the prosecutor's questions were held by the court below to be directly relevant to the question of petitioner's intent, they constituted a fundamental part of the government's case against him. By testifying for Watson, under circumstances where Watson had been cross-examined about other topics earlier, the prosecutor caused the jury to believe that Watson unequivocably made the statements attributed to him. This inference was bolstered when the prosecutor asked petitioner if Watson is truthful and if petitioner was aware that Watson had previously testified about petitioner's admissions in the form suggested by the prosecutor. Therefore, the jury inevitably concluded that Watson had not only testified but the testimony, in the form stated by the prosecutor, was true. The court's subsequent and limited intervention did little to undermine this conclusion. *Berger v. United States*, 295 U.S. 78, 84-85, 79 L.Ed. 1314, 1320, 55 S.Ct. 629 (1934).

If the Court considers it appropriate to apply the holding in *Douglas v. Alabama, supra*, to the case at bar, it is suggested that the court should consider whether it is appropriate to presume substantial prejudice to petitioner under the standard articulated in *Davis v. Alaska, supra*, at 415 U.S. 318, 39 L.Ed.2d at 355 and the cases cited therein. In both *Davis, supra* and the case at bar the witness in

question who could not be fully cross-examined, testified at trial. In both cases the jury was under the misconception that the witness had been subjected to a full and complete cross-examination concerning all relevant lines of inquiry. Thus, based upon a previous decision by this court, it appears that sufficiently similar circumstances exist to reverse the finding by the court below that petitioner has suffered no prejudice.

The court below declined to attach constitutional significance to the error complained of herein. Therefore, it did not analyse the issue presented under either the automatic reversal or harmless error standards. *Compare, Chapman v. California*, 386 U.S. 18, 20-24, 17 L.Ed.2d 705, 707-11, 87 S.Ct. 987, *rehearing denied*, 386 U.S. 937, 18 L.Ed.2d 241, 87 S.Ct. 1283 (1967), with *Davis v. Alaska, supra, United States v. Uramoto*, 638 F.2d 84, 87 (9th Cir. 1980), *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980). It is respectfully suggested that if the petition is granted, and the Court declines to presume that petitioner suffered prejudice under the holding of *Davis v. Alaska, supra*, the record will disclose that the error was not harmless beyond a reasonable doubt.

3. The Prosecutor's Misconduct as a Violation of Petitioner's Fifth Amendment Rights.

This case also presents the question of whether the prosecutor substantially prejudiced petitioner's right to a fair trial through improper suggestions, insinuations, and the improper bolstering of Watson's credibility to the jury. While cross-examining petitioner, the prosecutor plainly suggested that Watson had previously testified that petitioner, before the arson, joked about the financial rewards which a fire sale could reap for Cal Stereo. Moreover, after eliciting petitioner's opinion that Watson was an honest

man, the presecutor flatly informed the jury that Watson overheard petitioner joking about "Puff the Magic Dragon." In fact, Watson never claimed to have overheard these statements. His grand jury testimony demonstrates that he could not recall ever hearing Petitioner say that a "fire sale would be a good thing", or that it was "a good way to make money". He thought that petitioner might have used the phrase "Puff the Magic Dragon" but could not remember specific instances when he made this statement. Finally, when the prosecutor asked him if the petitioner in fact used the phrase "Puff the Magic Dragon", Watson could not acknowledge that the phrase was uttered by petitioner. All he could remember was that petitioner insinuated "something about fire." Appendix "E", *infra*.

Thus, the prosecutor compounded the Sixth Amendment violation which is discussed above. He misstated Watson's grand jury testimony and vouched for the truth of the statements which he attributed to Watson through the use of leading questions during cross-examination. Watson had previously testified about other facts and had been fully cross-examined. The jury was likely to assume that the prosecutor accurately reproduced Watson's grand jury testimony about petitioner's admissions. The trial court did ultimately intervene. However, under the circumstances, it is unlikely that the prejudice caused by the prosecutor's improper suggestions and bolstering of Watson's credibility was removed when the court finally sustained one of petitioner's objections. *Berger v. United States, supra*, at 295 U.S. 84-85, 79 L.Ed. 1320. Other cases decided by this court under similar circumstances have held that unless the case against the petitioner was extremely strong, it is highly probable that petitioner suffered sufficent prejudice to warrant a new trial when prosecutorial misconduct occurs. *Berger v. United States, supra*, 295 U.S. at 89, 79 L.Ed. 1321.

Conclusion.

All of the errors complained of herein stem from successful attempts by the prosecutor to manipulate the evidence in a manner which enhanced the government's chances for a conviction. Petitioner has made timely objections with respect to each error raised herein. The evidence which petitioner asserts was improperly elicited at trial and improperly placed before the Court of Appeals, was, in that court's opinion, highly relevant to the issue of petitioner's guilt.

The court below declined to engage in an analysis of the errors alleged herein as they relate to either the rule of automatic reversal or the harmless error standard. The case against petitioner was not overwhelming. The prosecutor violated the Fifth and Sixth Amendments and set up an elaborate trap. Watson could not give competent testimony at trial about petitioner's purported admissions. The prosecutor called Watson as a trial witness and excused him without any attempt to elicit this testimony from him. Instead, the prosecutor testified for Watson. He cross-examined petitioner and stated that petitioner had made a number of damaging admissions to Watson. When petitioner denied doing so, the prosecutor stated that Watson had testified on another occasion, in a manner which made petitioner's denials a blatant lie. In fact, Watson had not done so. This manner of questioning was not only sanctioned by the court below, but was considered relevant to the issue of petitioner's guilt. In reaching this conclusion, the court below augmented the record and evaluated important issues of fact through non-record testimony which had never been subjected to cross-examination.

For these reasons, it is respectfully requested that this Court grant the petition herein in order to determine if the

court below erred by both condoning the prosecutor's behavior and augmenting the record on appeal.

Respectfully submitted,

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September 24, 1982